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RES JUDICATA-USE DEFENSIVELY OF FORMER JUDGMENT BY ONE NOT A PARTY OR IN PRIVITY WITH A PARTY TO FORMER ACTION

Richard H. Conn
University of Michigan Law School

RES JUDICATA—USE DEFENSIVELY OF FORMER JUDGMENT BY ONE NOT A PARTY OR IN PRIVITY WITH A PARTY TO FORMER ACTION—Plaintiff sued defendant in a federal district court to foreclose a mortgage lien alleged to exist on defendant's land in consequence of a loan by plaintiff[1] to defendant's predecessor in title. De-

[1] Actually, plaintiff sued as administrator of the estate of the now deceased lender.

fendant's land was but a part of the tract originally encumbered. In a prior action in the state court, plaintiff had sought foreclosure of the same mortgage against the holder of another parcel of the mortgaged land on the precise grounds now asserted against defendant. In that action it was held that the entire mortgage had already been discharged.[2] Defendant moved for summary judgment, contending that the former decision estopped plaintiff from reasserting the validity of the mortgage claim. Plaintiff objected on the ground that defendant had not been a party (or a privy to a party) to the form action. *Held*, motion granted. *Riordan v. Ferguson*, (D.C. N.Y. 1948) 80 F. Supp. 973.

The doctrine of res judicata has been called one of the most beneficial principles of our jurisprudence.[3] Traditionally, the bar of the prior judgment must operate mutually; that is, not only those against whom the former judgment is asserted, but also those claiming the benefit of it, must have been parties or privies to parties to the first action.[4] Whatever its origin[5] and justification, an inflexible adherence to this strict mutuality rule has long been criticized.[6] Accordingly, the use of former litigation as an estoppel has been expanded by the development of several firmly established exceptions.[7] Estoppel effective unilaterally has been chiefly recognized in cases of derivative liability; that is, master-servant, principal-agent, indemnitor-indemnitee.[8] When such a relationship exists and successive suits against the two parties are brought by the same plaintiff, either party, though neither privy to nor bound by the prior determination, can assert it as conclusive on any ground equally applicable to both actions.[9] The defendant here cannot claim the benefit of the former adjudication on the basis of having been a party to

[2] Foss v. Riordan, 84 N.Y.S. (2d) 224 (1947).

[3] "The maxim that there must be an end to litigation was dictated by wisdom and is sanctioned by age." 2 FREEMAN, JUDGMENTS, § 625 (1925).

[4] Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 32 S.Ct. 641 (1912). Cf. JUDGMENTS RESTATEMENT, § 93 (1942). This, of course, raises the issue as to who is a "party" to the prior action. For a discussion of the degree of participation and control required, see 91 UNIV. PA. L. REV. 467 (1943); 139 A.L.R. 9 (1942).

[5] See 7 BENTHAM'S WORKS, Bowring's ed., 171 (1843).

[6] That one who has not in legal contemplation had a day in court should not be charged with a former action is clearly justifiable by the requirement of due process of law. See Coca Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934). However, as to one who has had a full hearing and who seeks to relitigate the identical operative facts merely because he has switched adversaries, there is less reason for requiring that the one asserting the estoppel must be in privity with a party to the former action. Bernhard v. Bank of America, 19 Cal. (2d) 807, 122 P. (2d) 892 (1942).

[7] See 35 YALE L. J. 607 at 609 (1926). Cf. JUDGMENTS RESTATEMENT, §§ 94-111 (1942).

[8] As to its application when joint tortfeasors are successively sued, there is yet much conflict. See Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 32 S.Ct. 641 (1912), holding res judicata inapplicable because of lack of mutual estoppel. For the argument that unilateral estoppel should be applicable here, see 91 UNIV. PA. L. REV. 467 at 470 (1943).

[9] Here unilateral estoppel is warranted by the injustice of allowing recovery against a defendant for conduct of another when that other has been exonerated by direct suit. See cases cited in 9 VA. L. REV. (n. s.) 241 at 245-7 (1923).

that action or a privy to a party;[10] nor is the situation such as to invoke the usual exceptions to the strict rule. By holding unilateral estoppel available against plaintiff, this decision suggests the broad principle that one who has previously had an opportunity to litigate an issue will be conclusively bound by the former determination in any subsequent case involving the same issue, even though the one seeking the benefit of the prior action was neither a party thereto nor bound thereby.[11] Although there is some precedent for this rule,[12] the instant case must be regarded as a pioneer in the attempt to increase the scope of res judicata by extending the doctrine of unilateral estoppel into new areas. It is submitted that this expansion can be justified by the basic policies underlying the doctrine of res judicata; that is, that a party is entitled to but one day in court and repetitious litigation is to be avoided.[13] The principle here adopted reflects a noticeable tendency on the part of the courts to strengthen the doctrine of res judicata and to develop it as an effective expedient to reduce the burdens of litigation.[14]

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[10] For a definition of "party" and "privy," see 1 GREENLEAF, EVIDENCE, 16th ed., § 523 (1899); 2 BLACK, JUDGMENTS, 2d ed., § 549 (1902). For purposes of res judicata, a "privy" is one who acquires an interest in the subject matter of the litigation *after* rendition of the prior judgment.

[11] The same principle seems to have been employed in the more recent case of Cantrell v. Burnett & Henderson Co., (Tenn., 1948) 216 S.W. (2d) 307. Here a purchaser of a new car, who had previously sued the retail distributor for alleged defects in the automobile which were determined to be non-existent, was estopped to reassert the alleged defectiveness in a subsequent suit against the manufacturer, who had not been a party to the former decision.

[12] To the effect that the estoppel need not be mutual, see Bernhard v. Bank of America, 19 Cal. (2d) 807, 122 P. (2d) 892 (1942), holding that only three prerequisites are essential for a plea of res judicata: (1) the issue decided in the prior litigation must be identical with the one involved in the present action; (2) there must have been a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party or in privity with a party to the former adjudication. Also see Coca Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934); United States v. Wixler, (D.C. N.Y. 1925) 8 F. (2d) 880; Good Health Dairy Products Corp. v. Emery, 275 N.Y. 14, 9 N.E. (2d) 758 (1937).

[13] Protection for the party sought to be estopped can be achieved by requiring strict identity of the common issue. For an argument against this extension of unilateral estoppel, see 57 HARV. L. REV. 98 (1943); 38 YALE L. J. 299 (1929).

[14] Res judicata has developed new vigor through recent decisions of the United States Supreme Court solidly reaffirming its underlying policy and extending its applicability. See Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317 (1940); Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657 (1947).